

329167

PHMSA-05-21224-1

**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
ADMINISTRATOR FOR THE
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION¹**

In the Matter of:

S&S Fire Extinguishers, Inc.,

Respondent.

**PHMSA Case No. 01-102-CRS-CE
DMS Docket No. PHMSA-05-20972**

RECEIVED
FEB 10 2005
U.S. DEPARTMENT OF TRANSPORTATION
PHMSA

DECISION ON APPEAL

I. Background

On February 4, 2004, the Office of the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued a Superseding Order (Order)² to S&S Fire Extinguisher, Inc., (Respondent) finding that Respondent had knowingly committed the following five violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of \$7,435:

- Violation No. 1 - Representing and certifying cylinders as having been condemned in

¹ Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline transportation and hazardous materials transportation. See, section 108 of the Norman Y. Mineta Research and Special Programs Improvement Act (Public Law 108-426, 118 Stat. 2423-2429 (November 30, 2004)). See also, 70 Fed. Reg. 8299 (February 18, 2005) redelegating the hazardous materials safety functions from the Research and Special Programs Administration to the Administrator, PHMSA.

² On February 28, 2001, PHMSA issued an Order to Respondent citing Respondent's failure to respond to the January 8, 2001 Notice of Probable Violation. Respondent provided evidence that its timely response was lost in the mail. Thus, PHMSA reopened negotiation with Respondent. The February 28, 2001 Order was cancelled and replaced by the February 4, 2004 Order.

accordance with the HMR, when Respondent did not stamp X's over the DOT specification numbers or stamp "condemned" on the cylinder or render the cylinder incapable of holding pressure, in violation of 49 C.F.R. § 171.2(c) and 173.34(e)(6)(ii) (on or after October 1, 2002, 49 C.F.R § 180.205(i)(2)).

- Violation No. 2 - Representing, certifying and marking cylinders as having been successfully retested in accordance with the HMR, when Respondent did not maintain complete records of reinspections and retest, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(8)(ii)(A) and (B) (on or after October 1, 2002, 49 C.F.R. § 180.215(b)).
- Violation No. 3 - Representing, certifying and marking DOT specification cylinders as having been successfully retested in accordance with the HMR, when after a malfunction in the test equipment, Respondent did not increase the test pressure for the second test by 10% or 100 psi, whichever is less, in violation of 49 C.F.R. §§ 171.2(c) and 173.34(e)(4)(v) (on or after October 1, 2002, 49 C.F.R § 180.205(g)(5)).
- Violation No. 4 - Allowing employees to perform a function subject to the HMR when the employees were not provided with hazardous materials training and training records were not created and retained, in violation of 49 C.F.R. §§ 172.702, 172.704(a)(1), (a)(2), (a)(3) and 172.704(d).
- Violation No. 5 - Offering for transportation in commerce hazardous materials, fire extinguishers, 2.2, UN1044, when Respondent did not prepare shipping papers that described the materials by its proper shipping description or included a 24-hour emergency response telephone number, in violation of 49 C.F.R. §§ 171.2(a), 172.202(a) and (b) and 172.604.

The Superseding Order, which is incorporated by reference, modified the \$10,250 civil penalty originally proposed in the January 8, 2001, Notice of Probable Violation (Notice).

Respondent timely submitted an appeal of the Superseding Order on February 25, 2004.

II. Discussion

In this appeal, Respondent contends that the civil assessment will dramatically impact its operation and requests that the penalty amount be reduced to \$250 per violation. In addition, Respondent stated that it had submitted additional corrective action documentation that was apparently lost in the mail. As discussed below, Respondent's appeal must be denied. However, additional factors, which are discussed below, warrant further reducing the penalty amount to \$7,020.

This enforcement case arose out of an August 9, 2000 compliance inspection at Respondent's facility. During the compliance inspection, PHMSA's inspector conducted an interview with Respondent's representative and reviewed Respondent's hydrostatic retest records, shipping documents and training records. Based on the interview and document review, the inspector determined that Respondent had committed five violations of the HMR. Specifically, Respondent failed to properly condemn compressed gas cylinders, failed to maintain accurate hydrostatic retest records, failed to properly retest cylinders after testing equipment failure, failed to provide training to its hazmat employees, and failed to properly complete hazardous materials shipping papers.

Respondent does not deny that it violated the HMR, but contends that because it engaged in prompt and appropriate corrective action and that the penalty amount would hurt its operation because it is a small business, the penalty amount should be lowered to \$250 per violation, for a total assessment of \$1,250. Respondent's arguments have merit and are a proper basis for lowering the fine as assessed in the Superseding Order. However, Respondent's arguments do not warrant reducing the penalty amount as low as Respondent requests.

In its January 2001 correspondence, Respondent provided some corrective action documentation addressing the violations alleged in the Notice. Respondent's corrective actions were incomplete, however, and during a September 2003 informal telephone conference, PHMSA counsel and the inspector discussed with Respondent what additional documentation Respondent should provide to demonstrate that it had fully corrected the alleged violations. Respondent indicated that it would provide the additional information to PHMSA counsel. PHMSA counsel did not receive any additional materials from Respondent, and, on February 4, 2005, PHMSA's Chief Counsel issued the Superseding Order incorporated in this appeal. In that

Superseding Order, PHMSA gave Respondent partial penalty mitigation for the corrective action documentation that it had submitted prior to the September 2003 informal conference. Upon receipt of the Superseding Order, Respondent provided PHMSA counsel with documentation demonstrating that it had in fact submitted additional documentation, as it promised to do in the September 2003 conference.

PHMSA has no record of ever receiving that information. However, it is clear from the U.S. Postal Service tracking information that Respondent did attempt to provide additional material to PHMSA. As a result of the discussions held during the informal conference, PHMSA counsel is satisfied that Respondent fully understood the cause of the violations, and that Respondent had taken the necessary steps to correct those violations and to prevent future violations of the HMR. Based on this fact, I have determined that the additional documentation Respondent attempted to provide following the informal conference, would have been sufficient to warrant further penalty mitigation, and I have reduced the proposed civil penalty accordingly. Respondent also ask that the penalty be reduced based on its status as a small business. Based on a review of the evidence, I agree that Respondent should receive additional penalty mitigation based on its status as a small business.

III. Findings

I have determined that there is sufficient evidence to warrant further mitigation of the civil penalty assessed in the Chief Counsel's Order, and I reduce the penalty to \$7,020. I find that a civil penalty of \$7,020 is appropriate in light of the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant

factors. Therefore, the Superseding Order of February 4, 2004, is modified with respect to the penalty assessment only. In all other aspects, the Superseding Order is affirmed as being substantiated in the record and as being in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Due Date. Respondent must pay this \$7,020 civil penalty within 30 days of the date of this Action on Appeal.

Payment Method. Respondent must pay the civil penalty by wire transfer. Detailed instructions or sending a wire transfer through the Federal Reserve Communication System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Action on Appeal. Please direct questions concerning wire transfers to:

Financial Operations Divisions (AMZ-120)
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone No.: (405) 954-8893

Interest and Administrative Charges. If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. 89.23.

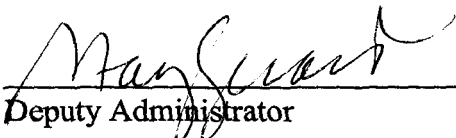
The rate of interest is determined under the above authorities. Interest accrues from the date of Action on Appeal. A late-payment penalty of six percent (6%) per year applies to any

portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives this Action on Appeal.

Treasury Department Collection. FAA's Financial Operations Division may also refer this debt and associated charges to the Department of the Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31 C.F.R. § 901.3. Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights to an offset. The debtor has the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness; and (5) the right to enter into a written agreement with the agency to repay the debt. This Action on Appeal constitutes written notification of these procedural rights.

V. Final Administrative Action

This Decision on Appeal constitutes the final administrative action in this proceeding.


Deputy Administrator

Date Issued: 5/2/05

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 2nd. day of May, 2005, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

S&S Fire Extinguishers, Inc.
P.O. Box 39100
Solon, Ohio 44139
ATTN: Mr. Mark Glatzer, President

Original Order with Enclosures
Certified Mail Return Receipt

Mr. Doug Smith, Enforcement Officer
Office of Hazardous Materials Enforcement
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

One Copy (without enclosures)
Personal Delivery

Kevin Boehne, Chief
Office of Hazardous Materials Enforcement,
Central Region Office
2300 East Devon Avenue
Des Plaines, IL 60018-4696

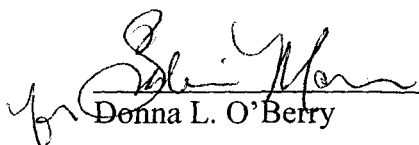
One Copy (without enclosures)
First Class Mail

Donna O'Berry, Attorney
Pipeline and Hazardous Materials Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

One Copy
Personal Delivery

U.S. DOT Dockets
U.S. Department of Transportation
400 Seventh Street, S.W., RM PL-401
Washington D.C. 20590

One Copy
Personal Delivery


Donna L. O'Berry